United States Postal Service *and* American Postal Workers Union, Local No. 320, AFL–CIO. Case 32–CA–10619(P)

April 30, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On November 12, 1991, Administrative Law Judge Joan Wieder issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United States Postal Service, Stockton, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 1(a).

''(a) Refusing to bargain collectively with the American Postal Workers Union, AFL–CIO as the exclusive representative of all the employees in a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, composed of:

> All postal clerks, maintenance employees, custodians and special delivery messengers; EXCLUDING all other employees, guards, and supervisors, as defined in the Act,

by refusing to furnish it the requested Turner action letter.''

Virginia L. Jordan, Esq., for the General Counsel.
M. Perry Johnson Jr., Esq., of San Bruno, California, for the Respondent.
Lyal Beeskau, of Stockton, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. I heard this case in Stockton, California, on August 8, 1991. On or about October 2, 1989, a charge was filed by American Postal Workers Union Local No. 320, AFL–CIO (the Charging Party, APWU, or Union) against the United States Postal Service (Respondent). Following an investigation, the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing dated November 13, 1989, as amended, alleging, inter alia, Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act, when, since about August 24, 1989, it failed and refused to provide the Union with certain information necessary for and relevant to the Union's performance of its function as the exclusive collective-bargaining representative of the employees in the unit.

Respondent discharged a postal clerk, M. Tomingo, for ''threatening to kill a fellow employee.'' The Union filed a grievance concerning Tomingo's discharge. The Union requested information and documents in preparation for processing this grievance, including a ''copy of action letter against S. Turner, supervisor, involving Naomi Bravo.'' Respondent denied the Union's request for the Turner action letter.

Respondent's timely filed answer to the complaint, as amended, admits certain allegations, denies others, and denies any wrongdoing. Respondent seeks dismissal on several grounds: (1) the requested information was not relevant to the grievance; (2) the requested information is confidential; (3) Respondent is precluded from providing the Turner action letter by the Privacy Act; (4) the Board should defer to the final and binding decision of Arbitrator Levak; and, (5) the Board should defer to the ''National Arbitration Decision'' of Arbitrator Carlton Snow.

All parties were given full opportunity to appear and introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

Based on the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs, I make the following

[1] In the ''Discussion and Conclusions'' portion of her decision, the judge inadvertently placed quotation marks around what is in fact a paraphrase of the Board's holding in *Postal Service (Main Post Office)*, 289 NLRB 942 (1988). We correct the error.

[2] The Respondent relies, inter alia, on *Westinghouse Electric Corp.*, 304 NLRB 703 (1991), in support of its contention that, even if the Board adopts the judge's finding of a violation, it should not order that the disputed information be provided to the Union. The basis for the argument is that, with the conclusion of the arbitration, the information is no longer relevant. Respondent's reliance is misplaced. In *Westinghouse*, no exception was taken to the judge's findings that the only possible relevance of the information was in connection with a proceeding to reopen the arbitration, and the arbitrator there was completely without authority to reopen such record. In the instant case, no such showing has been made by the Respondent and, accordingly, we agree with the judge that an affirmative remedy is warranted.

We shall modify the judge's recommended remedy and cease-and-desist provisions of her recommended Order by deleting references to the Respondent's ''affiliated local,'' to reflect the parties' stipulation that it is immaterial whether Local 320 is a labor organization as the Respondent does not dispute that a duly authorized agent of the National Union requested the information that is disputed in this case. No revision is necessary to the judge's recommended notice, which is consistent with this modification.

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent's answer to the complaint admits, the parties have stipulated, and I find that Respondent provides postal services for and operates various facilities throughout the United States in the performance thereof, including the General Mail facility located at 3131 Arch Road and a substation at 425 West Lane, both in Stockton, California. Both are administered by the Sacramento division of Respondent. The Board has jurisdiction pursuant to 39 U.S.C. § 1209 of the Postal Reorganization Act (39 U.S.C. § 101 et seq.).

The parties further stipulated: The APWU is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the National Labor Relations Act. The parties agree as set forth more fully below, that it is immaterial whether Local 320 of the APWU or any other local of the APWU is also a labor organization within the meaning of Section 2(5) of the Act as Respondent does not dispute that a duly authorized agent of the recognized bargaining agent requested the information which is disputed in this case.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *General Background*

Generally, the facts are undisputed. The parties have entered into a stipulation of facts, attached as Appendix A. Manuel Tomingo was employed by Respondent from November 20, 1972, to his termination on September 20, 1989. On August 11, 1989, Tomingo allegedly engaged in a verbal altercation during which he threatened to kill a coworker. After considering Tomingo's version of the incident, Respondent, on August 20, 1989, issued a ''Notice of Proposed Removal.''

The general manager/postmaster for the Sacramento division, which includes Stockton, California, issued a memorandum dated June 15, 1987, to all employees of the Sacramento division which provided, in part, as follows:

> There is no place for attacks or threats of physical violence by employees against other employees in the workplace.
>
> Actual physical attacks by employees constitute very serious misconduct. While threats of violence may appear less serious, such conduct causes very real concern and apprehension on the part of the employees to whom they are directed and such is also considered to be serious misconduct.
>
> Employees have a responsibility to not engage in threats or assaults. Any employee who has been subjected to physical attack or a threat of violence has a responsibility to promptly contact his or her supervisor or the Postal Inspection Service. Appropriate administrative measures will be taken when this misconduct occurs, including severe disciplinary action and removal as warranted. Violence or threats of violence will not be tolerated.

In response to the notice of removal, on August 24, 1989, Union Steward Lyal Beeskau requested information; including the Turner action letter.[1] Turner, an admitted supervisor, was involved in another grievance alleging he assaulted employee Naomi Bravo. The grievance is referred to as the Bravo grievance. On August 25, 1989, Beeskau received a denial from David Uman,[2] without any explanation why Respondent would not furnish the Turner action letter. The Union, on September 7, 1989, filed a step 2 grievance contending the discipline imposed on Tomingo by Respondent was too severe ''considering other cases of similar nature at the General Mail Facility'' and Respondent's failure to provide requested information involving discipline of other employees at the facility, including the Turner action letter. Respondent denied the Union's step 2 appeal because the Turner incident occurred at a different facility under different supervision[3] and ''the policy of this Division that appropriate administrative measures will be taken when this type of misconduct occurs, including severe disciplinary action and removal if warranted.''

The Union entered a step 3 appeal on September 22, 1989, which Respondent denied on November 7, 1989. The Turner discipline was specifically mentioned in the step 3 appeal as illustrative of its claim of disparate treatment of Tomingo. The denial of the appeal by Respondent does not specifically mention the Turner action letter or any other information requested by the Union and does not directly and specifically address any request for this information.

On November 22, 1989, the APWU referred the Tomingo grievance to arbitration. The Tomingo termination grievance was arbitrated on January 23, 1990, and the arbitrator issued his opinion and award on February 5, 1990. The arbitrator concluded Respondent established by a preponderance of the evidence it had just cause for Tomingo's termination and denied the grievance. The arbitrator noted the Union's request for a copy of the Harvey Hammond case file and the Sederic

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[1] Respondent informed Beeskau in early November 1988 that Turner had received a letter of warning for his actions in the Bravo incident. The APWU sent Respondent a letter protesting the resolution of the Bravo grievance which specifically claimed Bravo was ''harassed, cursed and assaulted'' by Supervisor Turner. The Union protested the resolution of the Bravo grievance and after step 3, Respondent informed the Union the Union's request Turner be separated until completion of an investigation is ''not within the purview of the National Agreement grievance-arbitration procedure.'' The parties then agreed to accept the step 3 decision.

[2] Respondent's Stockton director of human resources, Uman, testified he denied the Union's request for the Turner action letter for several reasons including:

> (1) Mr. Turner is not in the bargaining unit, he's a supervisor, covered under different procedures. So, I felt that it was inappropriate to give the APWU a copy of the records belonging to Mr. Turner.
>
> (2) I didn't feel that the cases were anywhere similar. So, I didn't see any relevance in giving them that information.
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> (3) . . . there was the Privacy issue. The Privacy Act requires me not to give that information.
>
> (4) And then also for the privacy of Mr. Turner. Not giving the information to the union, lessening his effectiveness as a supervisor, number one, and number two, I just wasn't confident of what the union would do with the information. I didn't know that they wouldn't post it on the bulletin board or advertise it around.

[3] Turner worked at the General Mail facility and Tomingo worked at West Lane Station, both facilities are within the same division and subject to the same policy against assaults quoted above.

Turner action letter had been refused by Respondent and that the Union filed an unfair labor practice charge concerning Respondent's refusal to provide the requested information. After the Region issued a complaint in the instant proceeding, Respondent provided the Union with a copy of the Hammond suspension letter.

Arbitrator Thomas F. Levak also found:

> [T]he Union had a copy of the 7-day suspension letter issued to Hammond which it had received from him but did not have his entire file. Also, as noted above, Hammond testified at the arbitration hearing, and it is clear that at all time relevant the Union had knowledge of relevant facts of the Hammond case. Similarly, the Union had obtained all of the relevant facts concerning the Turner case from Bravo, and had obtained additional facts through the grievance filed on her behalf against Turner, which was appealed through Step 3, and from the EEOC proceeding.
>
> All the foregoing demonstrates that the Union was not prejudiced at the arbitration hearing by the Service's initial refusal to release the requested information. In addition, the Arbitrator has concluded that nothing within the National Agreement requires the release of materials concerning administrative or disciplinary action taken against supervisors. Action or non-action against supervisors is a matter totally outside the National Agreement and within managerial discretion, and cannot be utilized in arbitration to provide a basis for a disparate treatment argument. Such an argument must pertain to bargaining unit employees only. Therefore, the arbitrator rejects the Union's Article 17.3 defense.

B. *Position of the Parties*

The General Counsel argues the Respondent had an obligation to provide the requested information to the APWU for it was relevant to the Tomingo grievance. The Union's chief shop steward, Lyal Beeskau, testified he requested the information to determine if there was disparate treatment, and to determine ''if management was treating supervisors the same as clerk craft employees in similar offenses.'' As previously mentioned, Respondent has a policy concerning attacks or threats of physical violence dated June 15, 1987, which applies to all personnel.

Respondent denies the information was relevant, claiming disciplinary procedures involving supervisors are different from the progressive discipline requirements of the collective-bargaining agreement. Thus, Respondent claims the disparate treatment argument is without merit. Respondent also argues the complaint should be dismissed as moot for the arbitrator concluded the Turner action letter is not relevant to the Tomingo grievance and would not have been admissible if it had been offered in evidence in the arbitration proceeding. In the alternative, Respondent claims, if the information about a supervisor is found relevant, then Respondent's need to keep such information about supervisors confidential outweighs the Union's need for the information in processing a grievance. Respondent argues the Privacy Act of 1973 requires the requested information be kept confidential and not be disclosed, except under certain conditions not met in this proceeding.

Respondent moved for dismissal of the complaint for the above-stated reasons, and because the General Counsel failed to meet his burden of proving a violation by a preponderance of the evidence. Also, Respondent argues for dismissal because the APWU had been informed the Bravo grievance was resolved by the issuance of a warning letter to Supervisor Turner. Beeskau was informed by Dale Vernon, the president of the APWU Local 320, of the resolution of the Bravo grievance by the issuance of a warning letter well before the commencement of Tomingo's case.

Another basis Respondent posited for dismissal was the APWU's decision to proceed with the arbitration of the Tomingo termination grievance without the Turner warning letter. Respondent avers the arbitrator

> directly confronted the question in his arbitration decision . . . and ruled under binding arbitration provisions of the contract, first of all, that the union already had, through other sources, all of the information that it needed to make those arguments. And secondly, that the information was totally irrelevant to the proceeding.

For the reasons stated below, Respondent's motion to dismiss the complaint is denied.

C. *Discussion and Conclusions*

The initial question is whether the requested information is relevant to the Union's performance of its statutory duties as the employees' bargaining representative. *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956); *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). In determining relevance, the material requested should be ''reasonably necessary'' for the Union's function as the employees' statutory representative; *NLRB v. Item Co*., 220 F.2d 956 (5th Cir. 1955); whether there is a ''probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'' *NLRB v. Acme Industrial Co*., supra at 437. Relevance is determined in each case; ''the rule is not per se, and in each case the Board must determine whether the requested information is relevant, and if relevant, whether it is sufficiently important or needed to invoke a statutory obligation of the other party to produce it.'' *Columbus Products Co*., 259 NLRB 220 (1981).

The union is entitled to relevant information during the term of the collective-bargaining agreement to evaluate or process grievances and to perform other duties or take other actions necessary to administer the agreement. *Electrical Workers v. NLRB*, 648 F.2d 18, 25 (D.C. Cir. 1980); *J. I. Case Co. v. NLRB*, 253 F.2d 149, 153 (7th Cir. 1958). Information relating to employees outside the bargaining unit requires a special demonstration of relevance. *E. I. du Pont & Co*., 268 NLRB 1031 (1984); *Amphlett Printing Co*., 258 NLRB 86 (1981); *Leland Stanford Junior University*, 262 NLRB 136 (1982), enfd. 715 F.2d 473 (9th Cir. 1983). As the Board held in *Temple-Eastex, Inc*., 228 NLRB 203 (1977):

> It is well established that Section 8(a)(5) of the Act imposes upon an employer the duty to furnish a union, upon request, information relevant and necessary to enable the union to intelligently carry out its statutory ob-

> ligations as the employees' exclusive bargaining representative. And, under the standard of relevancy as applied by the Board and the courts, it is sufficient that the union's claim for information be supported by a showing of ''probable'' or 'potential' relevance. Furthermore, the fact that the information requested by a union may, as here, in part relate to employees outside the scope of the unit it represents does not necessarily justify an employer's refusal to provide such information.

The Union in this case has met its burden of showing good faith and sufficient relevance and necessity to meet the liberal discovery standards applicable in these cases; there is a reasonable probability the information would have been be useful to the Union in determining whether to file a grievance, pursue a grievance, or take other action to assure the contractual rights of unit employees. *New York Times Co.*, 270 NLRB 1267 (1984); *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863 (9th Cir. 1977); *Boyers Construction Co.*, 267 NLRB 227, 229 (1983); *O & G Industries*, 269 NLRB 986, 987 (1984).

The Union has shown the information sought has ''some bearing'' on the issues involved in the grievance, the defense of disparate enforcement of a divisionwide policy concerning assaults or threats of violence. *Postal Service (Main Post Office)*, 289 NLRB 942 (1988), enfd. 888 F.2d 1568 (11th Cir. 1989). Respondent admitted the rule was equally applicable to unit members and nonunit members, including supervisors. As the Board found id. at 942–943: ''information requested by unions concerning discipline of supervisors for violations of the same rule has relevance and Respondent failed to demonstrate legitimate reasons for imposing different degrees of discipline for similar misconduct.'' Citing *Department of Defense Dependent Schools*, 28 FLRA No. 33 (1987). The Union was informed by Respondent that Turner was not suspended or terminated from his employment, unlike Tomingo. Thus, the Union had objective facts to support its concern Respondent engaged in inappropriate disparate discipline in the Tomingo case. The potential relevance of the request should have been clear to Respondent in the context of the Tomingo grievance. *Soule Glass v. NLRB*, 652 F.2d 1055 (1st Cir. 1981); *Westwood Import Co.*, 251 NLRB 1213, 1227 (1980), enfd. 681 F.2d 664 (9th Cir. 1982). There was no inadequacy of communications, and the Union's request for the Turner action letter in performance of its statutory duties was sufficient to activate Respondent's duty to provide the letter.

That the Union had verbal information Turner was disciplined by the issuance of a warning letter was not sufficient; the Union did not know the contents of the letter and had no means to determine if there was in fact disparate discipline imposed by Respondent because Turner was a supervisor. Also, the Union doubted this information. As Beeskau testified:

> At the time [the information was requested], we didn't think anything existed and then we wanted to see if management was treating supervisors the same as clerk craft employees in similar offenses. And we were trying to determine whether there was any disparate treatment or not, involving Manuel Tomingo.

The Union had the right to determine if there was a similarity of infraction and discipline to ascertain if they should argue disparate treatment and to argue Turner's offense was similar to Tomingo's, including any conditions placed on his continued employment. In this case, the Union should have been afforded the opportunity to determine if the Turner action letter warranted the filing of a grievance for disparate treatment or to continue their claim Respondent engaged in disparate application of a policy equally applicable to supervisors and unit members. Respondent has failed to establish the disciplinary rules applicable to supervisors compared to those enforced against Tomingo are substantively different in instances involving violation of the policy against assaults or threats of violence. The nature and difference in the assaults or threats of violence has relevance only concerning the argument revolving around the justification for disparate treatment, not a showing that there are ''different standards of discipline in this instance, thereby compelling a finding that the requested information has no bearing on the grievances.'' *Postal Service (Main Post Office)*, supra, 289 NLRB at 943.[4]

As was the situation in the *Main Post Office* case, the assault prohibition applied to all employees, including supervisors, and ''the requested information potentially has 'some bearing' on whether the unit employees were harshly, unjustly, or disparately treated.'' Accordingly, I conclude General Counsel has borne his burden of establishing the requested information is relevant and Respondent has failed to establish the requested information does not have any bearing on the allegation Tomingo was treated disparately. That the requested information might not have provided ''conclusive proof of the allegations [of disparate treatment] in the grievances, this does not mean that the information fails to meet the relevancy standard by which such requests are judged.'' Id. at 943. Citing *Pfizer, Inc.*, 268 NLRB 916 (1984), enfd. 763 F.2d 887 (7th Cir. 1985).

Respondent argues information concerning supervisors is relevant only where the conduct of the supervisors and unit members arose out of the same incident. This argument is without merit. *Department of Defense Dependent Schools*, supra, 28 FLRA No. 33 (1987). There is no requirement the misconduct of unit and nonunit employees arise out of the same incident. Rather, the requirement is the misconduct of unit members is similar to the misconduct of nonunit employees. To find otherwise obviates the liberal discovery standards applied to determine the relevance of requests for information.

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[4] The Board also held, at 289 NLRB 943:

> It is undisputed that the Respondent's restrictions on gambling activity apply equally to supervisors and unit employees. Although, as the Respondent asserts, there may be legitimate reasons for imposing different degrees of discipline on supervisors and unit employees for similar misconduct, the only reason offered to justify such a disparity for the gambling violation here is the different level of responsibility exercised by each group. We do not agree, however, given the nature of the rule involved and its applicability to both groups that the different degrees of responsibility accorded each group automatically translates into different standards of discipline in this instance, thereby compelling a finding that the requested information has no bearing on the grievances. Nor do we agree with the Respondent's assertion . . . that *Marshall v. Western Grain Co.*, 838 F.2d 1165 (11th Cir. 1988), supports its Motion for Summary Judgment.

Respondent has failed to distinguish disparate application of rules arising from the same incident from allegations employers disparately applied a rule where separate incidents are involved but the same rule violation is alleged in the grievance. There were no factors or circumstances presented by Respondent showing the information was less relevant where the Union was meeting its statutory duties and responsibilities to the grievant when the same rule or policy violation by a supervisor occurred in a different incident. *Brazos Electric Power Cooperative*, 241 NLRB 1016 (1979), affd. 615 F.2d 1100 (5th Cir. 1980). In the circumstances of this case, I conclude the request has relevance to a legitimate union requirement. Id. at 1018. The Union had a legitimate need for the information to prepare a grievance which may have and did contend the discipline imposed on a unit member was excessive and constituted disparate application of a divisionwide rule.

The arbitrator's conclusion the requested information was not relevant under the collective-bargaining agreement is not dispositive of the issue nor do I find it convincing. I find the Respondent's deferral argument to be without merit. The Board has recently affirmed its ruling in *Postal Service*, 302 NLRB 918 (1991), ''that issues concerning a refusal to supply information are not subject to deferral to the grievance-arbitration process.'' Citing *Postal Service*, 280 NLRB 685 fn. 2 (1986).

Assuming deferral should be considered on the merits, I conclude such deferral would not be warranted in this case. As previously noted, Respondent has failed to demonstrate supervisors would be and are treated differently under the Respondent's divisionwide policy concerning assaults and threats of violence. That the arbitrator determined the information was not relevant under the contract does not determine the relevancy of the information under the National Labor Relations Act nor permit a conclusion the Union would find the information of no use in considering the position of disparate enforcement of the no-assault rule.

Further, there was no indication the arbitrator considered the statutory issue, rather, it appears he only acknowledged the issue was pending before the Board. In this case, the Union sought information prior to the commencement of the grievance/arbitration procedure; information which I found was clearly relevant to its evaluation and preparation of a grievance. The arbitrator did not examine the impact of Respondent's failure to provide the information at the commencement of the grievance procedures, which is further reason not to defer to the arbitrator's decision.

Respondent also requests deferral to a national arbitration decision wherein Arbitrator Carlton J. Snow held, contrary to Arbitrator Thomas F. Levak, that Respondent violated the parties' collective-bargaining agreement when it:

> denied the Union's request for information respecting the possible discipline of two supervisors from the grievant's post office, who are alleged by the Union to have engaged in specific misconduct both close in time to and similar to that charged against the grievant, so that the Union could compare the actual conduct and subsequent treatment of the grievant and the supervisors and/or potentially argue that the grievant's discharge was disparate and thus not for just cause.

Respondent failed to put the Snow decision in the record even though it had knowledge of the award. There was no explanation for this failure. As General Counsel noted in his request, I reject Respondent's motions and/or arguments based on Arbitrator Snow's award; the award was issued at least 1 week prior to the August 8, 1991 hearing in the instant case. There was no explanation for Respondent's failure to offer the Snow award during the hearing and it would be inappropriate to not consider this determination. Further, while the Snow award does involve a similar issue, it does not involve the same fact situation and does not specifically resolve the Tomingo grievance. However, even if the Snow award was properly entered into the record, it would not lead to deferral for the issues have not been mooted because the details of the Tomingo case were not considered by Arbitrator Snow and Respondent admits the Snow award does not resolve Respondent's claim the Privacy Act requires it to not disclose the Turner action letter.

To defer to the arbitrators' conclusions and/or dismiss this proceeding based on their decisions would breach the Board's holdings in *Postal Service*, supra, and *Postal Service*, supra at 685 fn. 2 and preclude the Union from performing its duty to evaluate the merits of a member's complaint. To hold otherwise would convert a statutory right into a contractual right by virtue of the Union's proceeding with the arbitration pending the resolution of the unfair labor practice charge and/or improperly infer waiver[5] where the Union did not clearly and unmistakably waive its statutory rights. On the contrary, as noted herein, the collective-bargaining agreement specifically provides there is no waiver of the Union's rights to obtain information under the Act. Also, as the General Counsel notes, Tomingo had been discharged and the Union's decision to proceed with the grievance/arbitration in an attempt to restore his employment does not waive or moot the alleged statutory violation of failure to provide relevant information. *Pfizer, Inc*., supra, 268 NLRB 916.

Respondent also claims the information sought is confidential and asserts giving the Union the information would adversely impact upon Turner's ability to function as a supervisor and raised the potential the Union would make the letter public. There is no showing the Union has ever breached a confidence with Respondent or was prone to make the information public. Respondent has failed to meet its burden of establishing the claim of privilege based on needed confidentiality.

The Union knew Turner assaulted Bravo and was told Turner had received an action letter as a result of a grievance. The Employer failed to show what harm would result

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[5] Art. 31, sec. 3, of the parties' collective-bargaining agreement provides:

> The Employer will make available for inspection by the Unions all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for any costs reasonably incurred in obtaining the information.
>
> Nothing herein shall waive any rights the Union or Unions may have to obtain information under the National Labor Relations Act, as amended.

if it permitted the Union to verify this information and permitted the Union to ascertain the nature and conditions of the disciplinary action taken against Turner. I find Respondent has not attempted to respond to the Union's request for information and did not attempt to mitigate any real or imagined business concerns by proposing to provide the information subject to reasonable restrictions. The Respondent has failed to meet its obligation to ''bargain for an accommodation between the union's information needs and the employer's justified interest.'' *Pennsylvania Power & Light*, 301 NLRB 1104 (1991).

Further, Respondent failed to demonstrate it even informed the Union of its claim the requested action letter was confidential and/or offered to negotiate means the Union could have met Respondent's concerns the information could become public and adversely impact on Turner's supervisory duties. As the Board held in *Washington Gas Light Co*., 273 NLRB 116, 117 (1984): ''The party asserting the claim of confidentiality has the burden of proof. [*McDonnell Douglas Corp*., 224 NLRB 881, 890 (1976).]''

I conclude Respondent has failed to prove its claim their interests in keeping the Turner action letter confidentiality outweighs the Union's need for the requested information. Respondent has failed to adduce evidence of a clear past practice or policy of confidentiality to support the claim. Respondent has not demonstrated it informed the supervisors their files were confidential or that the supervisors have requested a confidentiality policy. On the contrary, Turner's actions should have reasonably led him to anticipate any consequences of his verbal assault would become public knowledge. Respondent apparently has unfettered access to the files, and admittedly disclosed to the Union they disciplined Turner and the details of this discipline was contained in Turner's action letter. Respondent failed to explain why this partial disclosure was less damaging to its interests than provision of the action letter.

Further, I find Respondent's claim of a need for confidentiality to protect supervisors in their working relationships with line employees has not been shown to outweigh the Union's statutory and contractual rights to ''information necessary to determine whether to file or to continue the processing of a grievance under this Agreement.'' The Union has not requested to see Turner's personnel file, only the action letter Respondent informed them it issued to Turner for violating the same work rule Tomingo allegedly violated. On this record I find Respondent had failed to demonstrate its claimed interests in keeping the Turner action letter confidential outweighs the Union's statutory right to represent employees in the unit in processing of grievances.

The Board has previously rejected Respondent's confidentiality claim in similar circumstances, *Postal Service (Main Post Office)*, supra, 289 NLRB at 944, finding:

> Moreover, unlike information [in *NLRB v. Detroit Edison Co*., 440 U.S. 301 (1979)] reflecting confidential assessments by testing professionals of an individual's ''basic competence,'' no established public policy against disclosure of the information requested here exists. The information in question concerns willful activity of a kind that the Respondent has itself made the public basis for discipline and discharges of employees. Further, there was no showing that the supervisors expected the requested information to remain confidential or that the Respondent made a commitment to the supervisors to keep the information confidential.

Another defense raised by Respondent is it is prohibited from disclosing the requested information by the Privacy Act of 1974, 5 U.S.C. § 552(a). I conclude Respondent has failed to demonstrate considerations under the Privacy Act mandate withholding of the information or outweigh the Union's need for the information. In *Postal Service (Main Post Office)*, supra, 289 NLRB 942 at 944–945 (1988), enfd. 888 F.2d 1568 (1989), the Board held:

> Finally, the Respondent argues that it need not disclose the information because it is restricted from doing so under the Privacy Act of 1974. . . . The Respondent admits, however, that the requested information is stored in two record systems which provide for disclosure pursuant to the routine uses exception in the Privacy Act. Further, the Respondent admits that one of the routine uses which both record systems provide for is the following:
>
> Pursuant to the National Labor Relations Act, records from this system may be furnished to a labor organization upon its request when needed by that organization to perform properly its duties as the collective bargaining representative of postal employees in an appropriate unit.
>
> Thus, given our finding that the requested information is relevant and given that the very use for which the information has been requested is defined as a routine use for the information, we find that the Privacy Act does not prevent disclosure of the information. Citing *Postal Service*, supra, 280 NLRB 685 (1986), enfd. 841 F.2d 141 (6th Cir. 1988).

Respondent has not disputed the factual basis for this finding and thus I conclude these precedents are binding and the claim the Privacy Act prevents disclosure of the information is, under these circumstances, not meritorious.

I find since on or about August 25, 1989, Respondent has refused to provide requested information to the Union and since that date has refused to provide that information to the Union which are unlawful refusals to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over Respondent pursuant to Section 1209 of the Postal Reform Act.

2. American Postal Workers Union, AFL–CIO (APWU) is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material APWU has been the exclusive collective-bargaining representative within the meaning of Section 9(a) of the Act for the following employees:

> All postal clerks, maintenance employees, custodians and special delivery messengers; EXCLUDING all other employees, guards, and supervisors, as defined in the Act.

4. By failing and refusing to furnish the Union with certain information requested by it concerning the disciplinary record of a supervisor who violated the divisionwide policy against assaults and threats of violence or threats of violence, Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

It having been found Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the APWU, and/or its affiliated local, with information it requested on August 24, 1989, I recommend that Respondent cease and desist therefrom and that it take certain affirmative action necessary to effectuate the policies of the Act.

I recommend, inter alia, Respondent be required to furnish the Union, on request, the Turner action letter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, United States Postal Service, Stockton, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the American Postal Workers Union, AFL–CIO as the exclusive representative of all the employees in a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, composed of:

> All postal clerks, maintenance employees, custodians and special delivery messengers; EXCLUDING all other employees, guards, and supervisors, as defined in the Act, by refusing to furnish it or its affiliated local, the requested Turner action letter.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, furnish the Union the requested disciplinary Turner action letter.

(b) Post at all facilities in Stockton, California, copies of the attached notice marked ''Appendix B.''[7] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted immediately upon receipt and maintained by Respondent for 60 consecutive days in conspicuous places including all places where notices are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 32 in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX A

STIPULATION OF FACTS

1. The charge was filed by the American Postal Workers Union, AFL–CIO (herein APWU) on or about October 2, 1989, and served on Respondent on or about that same date by certified mail.

2. Respondent provides postal services for and operates various facilities throughout the United States in the performance thereof, including the General Mail facility located at 3131 Arch Road and a substation at 425 West Lane, both in Stockton, California. Both are administered by the Sacramento Division of Respondent. The Board has jurisdiction pursuant to 39 U.S.C. Section 1209 of the Postal Reorganization Act (39 U.S.C. Section 101, et seq.).

3. The APWU is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the National Labor Relations Act. The parties agree, as set forth more fully below, that it is immaterial whether Local 320 of the APWU or any other local of the APWU is also a labor organization within the meaning of Section 2(5) of the Act as Respondent does not dispute that a duly authorized agent of the recognized bargaining agent requested the information which is disputed in this case.

4. The employees of Respondent which constitute a unit for collective bargaining pursuant to Section 9(b) of the National Labor Relations Act are all postal clerks, maintenance employees, custodians and special delivery messengers; excluding all other employees, guards, and supervisors as defined in the Act.

5. The APWU has been the recognized bargaining representative of the employees in the bargaining unit since at least 1974, and at all times material to this case has been the designated exclusive bargaining representative of those employees and has been recognized as such by Respondent. At all times relevant, the APWU has, by virtue of Section 9(a) of the Act, been the representative of the employees in the unit with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

6. Since at least 1974, the APWU and Respondent have negotiated a series of collective bargaining agreements. The one in affect [sic] at all time[s] relevant to this case was effective by its terms for the period of July 21, 1987 to November 20, 1990 and is in evidence as Joint Exhibit 2.

7. On or about August 24, 1987, the APWU, through Lyal Beeskau, the Chief Steward of the APWU appointed pursuant to Article 17 of the collective bargaining agreement, requested, inter alia, ''a copy of [the] action against S. Turner, Super., involving Naomi Bravo.'' Mr. Beeskau was at this time an authorized agent of the APWU for the purpose of requesting this information for the purposes of a grievance. Accordingly, it is immaterial to this proceeding to make any factual or legal determination concerning the status of the Local Union, including any determination whether it is a labor organization as defined in Section 2(5) of the Act.

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[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

8. The request for the action letter concerning any discipline allegedly taken against Mr. Turner was denied by Respondent in writing on August 25, 1987, and has been denied to the APWU at all times since. The request of August 24, 1989, and the denial of August 25, 1989, are entered as Joint Exhibit 3 (one page).

9. At all times material herein, the following-named individuals occupied the positions set forth opposite their respective names, and are now, and have been at all times material herein, supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

G. Valine	Area Manager, Stations/Branches
David Uman	MSC Director, Human Resources

10. Manuel G. Tomingo was employed by Respondent in the Unit from November 20, 1972 until his termination on September 20, 1989.

11. On August 11, 1989, Manuel Tomingo was involved in a verbal altercation with fellow Unit employee Frank Sapata during which Tomingo allegedly threatened to kill Sapata. This verbal altercation is referred to herein as the Incident.

12. Frank Sapata reported the Incident to Respondent's supervisors.

13. On August 11, 1989, pursuant to a request from Respondent, Manuel G. Tomingo prepared and submitted to Respondent a hand-written description of his version of the Incident.

14. On August 20, 1989, Manuel G. Tomingo received a ''Notice of Proposed Removal'' dated August 17, 1989. The Notice is entered as Joint Exhibit 4.

15. Respondent has a policy against ''Assaults and threats of violence or Threats of Violence,'' which was in effect at the time of the Incident. The policy is entered as Joint Exhibit 5.

16. (a) Since on or about August 24, 1989, APWU, in writing, has requested that Respondent provide it with certain information relating to Respondent's disciplining, or lack thereof, of a named supervisor (Sederic Turner) for allegedly striking an employee of Respondent. (Joint Exhibit 3)

(b) Since on or about August 25, 1989, Respondent has failed and refused, and continues to fail and refuse, [to furnish the] APWU with the information requested concerning Sederic Turner. This refusal was communicated to the APWU by letter of August 25, 1989. (Joint Exhibit 3)

17. Entered as Joint Exhibit 6 is the October 21, 1988 Step 2 Grievance Appeal Form filed by APWU, on Naomi Bravo's behalf against Turner, herein called the Bravo Grievance. Entered as Joint Exhibit 7 is the November 4, 1988 response of Respondent to the Bravo Grievance.

18. In early November 1988, Chief Steward Lyal Beeskau, in conjunction with the Bravo Grievance, was informed by Respondent that Turner had received a letter of warning for engaging in the activity involved in the Bravo Grievance.

19. On November 23, 1988, APWU, sent a letter of protest to Respondent regarding Respondent's purported ''settlement'' of the Bravo Grievance. The letter is entered as Joint Exhibit 8.

20. On September 7, 1989, APWU, through the Union, filed with Respondent a Step 2 Grievance Appeal Form relating to Manuel G. Tomingo's proposed termination. The Step 2 Grievance Appeal Form is entered as Joint Exhibit 9. On September 20, 1989, Respondent denied Manuel G. Tomingo's grievance at the Step 2 level. Respondent's response to the Step 2 grievance is entered as Joint Exhibit 10. On September 22, 1989, APWU, filed a rebuttal to Respondent's September 20, 1989 denial of the grievance and refusal to provide the Information. The rebuttal is entered as Joint Exhibit 11.

21. On September 22, 1989, APWU, appealed Manuel G. Tomingo's grievance to Step 3. The APWU's Step 3 Grievance Appeal is entered as Joint Exhibit 12.

22. On November 7, 1989, Respondent denied Manuel G. Tomingo's grievance at the Step 3 level. The denial is entered as Joint Exhibit 13.

23. On November 22, 1989, APWU, referred Manuel G. Tomingo's grievance to arbitration. The referral to arbitration is entered as Joint Exhibit 14.

24. APWU and Respondent arbitrated Manuel G. Tomingo's termination grievance on January 23, 1990.

25. The Arbitrator, Thomas F. Levak, issued his Opinion and Award on February 5, 1990. The Opinion and Award are entered as Joint Exhibit 15.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with the American Postal Workers Union, AFL–CIO by refusing to furnish it the requested disciplinary action letter involving violation of the Sacramento division policy against assaults and threats of violence or threats of violence.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL promptly furnish the American Postal Workers Union, AFL–CIO the requested disciplinary action letter involving violation of the Sacramento division policy against assaults or threats of violence.

UNITED STATES POSTAL SERVICE